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17

18 UNITED STATES DISTRICT COURT

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20 NORTHERN DISTRICT OF CALIFORNIA

21

22 VILMA SERRALTA,

23 No. C0801427 CW

24 Plaintiff,

25 **DEFENDANT'S NOTICE OF MOTION AND
MOTION IN OPPOSITION TO PLAINTIFF'S
MOTION FOR ENTRY OF DEFAULT
JUDGMENT**

26 vs.

27 Date: [to be determined]

28 SAKHAWAT KHAN; ROOMY KHAN;
and DOES ONE through TEN,
inclusive,

Defendants.

Time: [to be determined]

Ctrm: Courtroom B, 15th Floor

[Hon. Maria-Elena James]

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1 TO ALL PARTIES AND THEIR COUNSEL ON RECORD

2 PLEASE TAKE NOTICE that Defendants are filing this motion in opposition to Plaintiff's
3 motion for Default Judgment.

4 This Motion is made on the grounds that Defendants have attempted to comply, in good
5 faith, with all of Plaintiff's discovery requests. Furthermore, any contention by Plaintiffs that
6 Defendant's discovery production has been untimely or insufficient, stands to be a result of the
7 extensiveness and often unreasonable specificity requirements of Plaintiff's requests, and not of any
8 intentional failure on Defendant's part. In addition, the alleged forgery of DOCUMENT 308, was
9 unknown to defendants at the time of its production and was in no way a result of any advice or
10 suggestion by Defendants. See Declarations of Harleen Chopra, Roomy Khan and Sakhawat Khan.
11 Any forgery that may have been committed was done rather by the Khan's assistant, Harleen
12 Chopra, and was done without any knowledge on the part of Defendants.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I STATEMENT OF ISSUES**

15 The issues here are whether the conduct of Defendants is egregious enough to warrant a
16 default judgment, and thus take away their opportunity to have their day in court. Plaintiff is
17 contending that a default judgment is warranted mostly based upon alleged forgery of a certain
18 Document KHAN 308 along with altered cancelled checks related to said KHAN 308. However,
19 KHAN 308 was actually produced and handled by Harleen Chopra, Defendant's ex-personal
20 assistant, with no knowledge from Defendants as to how the document was produced or who
21 actually signed it. As this alleged fraud could not have been willfully conducted by Defendants,
22 granting a default judgment would be unwarranted in light of Defendant's constant good faith effort
23 in complying with Plaintiff's discovery requests.

24 **I. STATEMENT OF FACTS**

25 The present suit was filed on March 13, 2008 by Plaintiff Vilma Serralta, alleging that
26 Defendants, Roomy and Sakhawat Khan, failed to pay her lawful wages. In their answer,
27 Defendant's denied the material allegations of Plaintiff's claim.

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1 On June 18, 2008, Plaintiff served her second request for production, which requested
2 p'oduction of documents related to Plaintiff's compensation. At the time of the request, Defendants
3 p'oduced all relevant documents they had available, including payroll account ledgers and summary
4 c'arts of payments. At the time of the request, the requested cancelled checks were not directly
5 a'cessible to Defendants due to their misplacement several years prior. *See Roomy Decl. ¶ 5.* Once
6 t'he request was made, however, Roomy Khan directed her ex-personal assistant, Harleen Chopra, to
7 s'art looking for the cancelled checks. Although Mrs. Chopra was quite sure the cancelled checks
8 w're in the Defendant's home, their exact location was unknown. After several months of searching
9 t'he Defendant's immense basement, other areas of the home, and endless quantities of boxes, the
10 c'hecks were eventually discovered by Mrs. Chopra on February 17, 2009. Those same checks were
11 p'oduced to Plaintiff on February 18, 2009. *See Roomy Decl. ¶ 6-7.*

12 Also requested in Plaintiff's second request for production were documents related to
13 Plaintiff's job duties and work hours, from which Defendants produced Bates stamped documents
14 Khan 124 and Khan 125. Plaintiff points out that Roomy Khan, during her first deposition, stated
15 t'at she was not aware of any other relevant document related to job duties and work hours.
16 However, Plaintiff fails to point out that Roomy later qualified her statement in her deposition that
17 t'he reason she was not aware of any other documents was because her assistant at the time, Harleen
18 Chopra, was in charge of producing these documents and having the appropriate person sign them.
19 (Roomy Khan Dep. Vol. 1), 70:24 – 71:10. The documents produced at the time of the request,
20 namely Khan 124 and Khan 125, were the documents Mrs. Khan was sure her assistant had
21 completed and which Mrs. Khan had possession. *See Roomy Decl. ¶ 8-10.* Mrs. Khan was not
22 a'ware of any other documents Mrs. Chopra actually completed and had signed. Although Mrs.
23 Khan had asked Mrs. Chopra to produce and have signed other documents, the documents produced
24 soon after Plaintiff's requests were the ones she actually had confirmation of. *See Roomy Decl. ¶ 8.*

25 Defendants also produced a certain document related to Plaintiff's second RFP labeled
26 KHAN 308 on March 13, 2009. This document, KHAN 308, was also discovered by Harleen
27 Chopra. Although Mrs. Khan was eventually informed that Mrs. Chopra had discovered KHAN
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1 308 at the same time of the cancelled checks, Mrs. Khan was not aware of this on February 18,
2 2009, when the checks were produced. In fact, Mrs. Khan stated in her second deposition that she
3 was not present when Mrs. Chopra supposedly found the cancelled checks and KHAN 308 in the
4 same box. (Roomy Khan dep. Vol. 2) 239:15. The fact is that Mrs. Chopra simply told Mrs. Khan
5 that she had found KHAN 308 in the same box and at the same time as the cancelled checks much
6 later February 18, 2009. *See Roomy Decl. ¶ 15.* Mrs. Khan took Mrs. Chopra's information to be
7 true, as communicated in her second deposition. Mrs. Khan, however, was not actually present
8 during the discovery of the documents to confirm this statement as true. At the time the cancelled
9 checks were produced, Mrs. Khan had no knowledge of KHAN 308 having been discovered. *See*
10 *Roomy Decl. ¶ 7.*

11 Despite Mrs. Copra's eventual statement that the cancelled checks were discovered at the
12 same time as KHAN 308, Mrs. Chopra did not actually present KHAN 308 to Mrs. Khan until mid-
13 March; which was the first time Mrs. Khan actually knew of its presence. *See Roomy Decl. ¶ 11.*
14 Defendants, at that point, produced KHAN 308 to Plaintiff on March 13, 2009. Mrs. Khan's
15 statements in her deposition that KHAN 308 was found on the same day as the cancelled checks,
16 neither, reflected what Mrs. Chopra has previously told her, rather than by firsthand knowledge. The
17 reason why Mrs. Chopra did not present KHAN 308 at the time the cancelled checks were
18 presented, is still unknown to Defendants. *See Roomy Decl. ¶ 15.* Furthermore, neither Defendant
19 ever had firsthand knowledge of the whereabouts of either the original or any copy of KHAN 308.
20 As stated in Roomy Khan's deposition, Mrs. Chopra always had the task of producing and handling
21 this document. (Roomy Khan Dep. Vol. 2) 241:2. Although Mrs. Chopra presented to Mrs. Khan a
22 copy of KHAN 308 just before its production on March 13, 2009, she failed to give Defendants the
23 original of said document. Only in late April did Mrs. Chopra present to Mrs. Khan the original
24 KHAN 308. Mrs. Chopra communicated to Mrs. Khan that she had recently found the original, thus
25 her delay in producing it. *See Roomy Decl. ¶ 16.*

26 Also in April, Plaintiff reiterated her request for the "best" copies of KHAN 309-314 and the
27 metadata for KHAN 308 and KHAN 125. However, Defendants regularly communicated to their

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1 previous attorney that they did not have knowledge of the whereabouts of any "best" copies of Khan
2 309-314. Rather, the best copies they could find were produced to Plaintiff earlier. Not until early
3 July did Mrs. Chopra come forward with the "best" copies of KHAN 309-314, when she presented
4 them to Mrs. Khan. Mrs. Chopra has never explained the delay in producing these documents.
5 These "best" copies of KHAN 309-314 were produced to Plaintiff July 7, 2009.

6 As for the metadata of KHAN 308 and KHAN 125, they were discarded on the computer in
7 which they were saved in June, 2007. *See* Roomy Decl. ¶ 19. Defendant's declaration on the matter
8 was produced to Plaintiff in early June. As this declaration did not touch upon the computer in
9 which KHAN 308 and KHAN 125 were created, a corrected declaration is currently being drafted
10 detailing the origin and recycling of that particular computer. Any alleged insufficiency of the
11 previous declaration was due to lack of recollection rather than any willful concealment.

12 Defendants have attempted in good faith to comply with every request Plaintiff has given
13 them in discovery. The fact that much of the requested documents and information was created
14 several years ago, and that many of the documents were actually handled by the ex-assistant,
15 Harleen Chopra, rather than by Defendants, is why there has been delay in producing some of the
16 requested information. Plaintiff perceives Defendant's responses as willful concealment and
17 deception. However, due to the above mentioned reasons, this is not the case.

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19 I I. ARGUMENT

20 A. Any alleged fraud or misconduct on the part of Defendants was not willful, in bad
21 faith, nor through fault of their own.

22 Very often, Courts refuse to impose sanctions in the absence of willful conduct. *Carlucci v.*
23 *Piper Aircraft Corp.*, 102 F.R.D. 472, 483 (D.C.Fla. 1984). Similarly, no willful conduct exists
24 here. Plaintiff's motion relies in large part on the alleged forged document, KHAN 308. However,
25 based on the deposition of Roomy Khan, it is clear that neither Defendant actually created KHAN
26 308 or even handled it before its production to Plaintiff. (Roomy Khan Dep. Vol. 2) 235:17-22;
27 236:13-22. In fact, as stated in Roomy Khan's first deposition, her ex-assistant, Harleen Chopra,

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1 v as the person who actually drafted all documents related to employee's job duties and who would
2 then transfer them to the appropriate party. (Roomy Khan Dep. Vol. 1), 70:24 – 71:10 Any
3 suspected fraud or forgery would, therefore, have been committed by the Defendant's assistant, Mrs.
4 Chopra, and not by either of the Defendants.

5 Furthermore, neither Roomy nor Sakhawat Khan had knowledge of any forgery of Khan
6 3)8, had it actually occurred. *See* Roomy Decl. ¶ 11 and Sakhawat Decl. ¶ 6. As stated above, Mrs.
7 Chopra was in charge of drafting the documents and transferring them over to the person who would
8 sign them. (Roomy Khan Dep. Vol. 1), 70:24 – 71:10 and (Harleen Chopra Dep. Vol. 2) 302: 10-
9 15. Defendants did little more than simply review them after they were written and before they
10 were transferred to the party to sign. (Roomy Khan Dep. Vol. 2) 241:2 Therefore, it was not
11 common practice for Defendants to be engaged in conduct that could lead to any type of forgery or
12 fraud with regard to these documents.

13 Although Defendants do not deny, as Plaintiff claims, that terminating sanctions may be
14 imposed when a party has engaged deliberately in deceptive practices that undermine the integrity of
15 judicial proceedings, the Khans have not engaged in deceptive practices DELIBERATELY. If
16 anything, their only fault was to trust the communication of their ex-personal assistant, Harleen
17 Chopra. Defendants have done nothing more than attempt to comply with every request of Plaintiff.
18 In short, granting a default judgment in this case would be very extreme in light of the fact that
19 Defendants have not engaged in any willful spoliation or in bad faith.

20 B. If Court does in fact determine misconduct on the part of Defendants, said
21 misconduct still does not cause any prejudice to Plaintiff.

22 Courts have decided that if requestors are able to show spoliation, they will likely need to
23 further demonstrate through "concrete evidence" that actual harm resulted from the respondent's
24 misconduct. Gates Rubber Co. v. Bando Chemical Industries, Ltd., 167 F.R.D. 90 (D.Colo. 1996).
25 In these decisions, the trial judge will seek to impose a punishment proportional to the harm
26 suffered, so it is in the requestor's interest to demonstrate the prejudicial effect of unproduced
27 evidence.

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1 Simply put, Plaintiff offers no argument in her motion as to any CONCRETE prejudice which
2 may have been caused by Defendant's alleged misconduct. Rather, Plaintiff simply enumerates the
3 list of alleged misconduct of Defendants and concludes that it causes prejudice to Plaintiff. (See
4 Plaintiff's motion for default judgment, p. 23-24) However, Plaintiff must show CONCRETE
5 evidence that there is prejudice. No such evidence is presented in Plaintiff's motion.

6 A party suffers prejudice if the [opposing party's] actions impair the party's ability to go to
7 trial or threaten to interfere with the rightful decision of the case.' " Henry, 983 F.2d at 948 (quoting
8 Adriana Int'l Corp., 913 F.2d at 1412). Presently, Plaintiff still remains with all the evidence she has
9 requested, with the exception of declarations detailing the circumstances of KHAN 123, 125, and
10 308. However, said declarations are currently being drafted and will be presented to Plaintiff
11 shortly. Even if certain metadata is no longer available, such as the metadata for KHAN 125 and
12 KHAN 308, those documents are still available in other forms for Plaintiff to use at trial.
13 Furthermore, if KHAN 308 was in fact the subject of forgery, this was evidence supporting
14 Defendant's claim; not Plaintiff's. Thus, rather than granting a default judgment, the most severe
15 form of punishment in these cases, all prejudice may be avoided by simply disregarding KHAN 308

16 Plaintiff's ability to go to trial and to argue her case remains intact. The Court's ability to
17 make a rightful decision on the case also remains intact since all requested evidence and documents
18 have been produced. Simply because there has been delay in producing some of the requested
19 documents and because there has been suspected forgery on a document that can be disregarded, is
20 not sufficient reason to deny Defendants their day in court.

21 C. Although Defendants deny any wrongdoing during discovery, Plaintiff's claims may
22 still be cured by lesser sanctions if Court determines misconduct.

23 Past case law has established that a default judgment is absolutely the most severe sanction
24 available to the Court. In most cases, the adequacy of lesser sanctions must first be determined.
25 (Adriana Int'l Corp., 913 F.2d at 1412-13) In determining whether a district court has properly
26 considered the adequacy of less drastic sanctions before dismissing a party's case, Courts have
27 considered (1) whether the district court explicitly discussed the feasibility of less drastic sanctions
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1 and explained why such alternate sanctions would be inappropriate; (2) whether the district court
2 implemented alternative sanctions before ordering dismissal; and (3) whether the district court
3 warned the party of the possibility of dismissal before ordering dismissal. (Adriana Int'l Corp., 913
4 F.2d at 1412-13) None of the above options have been exhausted as of yet.

5 The truth is that lesser sanctions would be most appropriate in this present circumstance. At
6 the very least, KHAN 308 may be discarded as evidence, as it is only evidence which supports
7 Defendant's arguments rather than Plaintiff's. In addition, specific jury instructions regarding the
8 suspected forgery and/or fines would also be more than sufficient to avoid prejudice to Plaintiff. A
9 default judgment, however, seems extreme since there is no apparent prejudice to Plaintiff, the
10 alleged misconduct was not a result of any willful conduct by Defendants, and any number of lesser
11 sanctions the Court orders would suffice.

12 D. There has been no pattern of deception or discovery abuse on the part of Defendants.

13 Plaintiff claims Defendants have engaged in a PATTERN of deception. In her motion,
14 Plaintiff brings up the production of the copies and the originals of the cancelled checks and their
15 a leged alteration, the production of the alleged forged document KHAN 308, the production of the
16 "best" copies of KHAN 309-314, and the metadata for KHAN 308 and 125. The production of the
17 aforementioned documents will be discussed as follows:

18 1) Cancelled Checks

19 As stated in the statement of facts, at the time of Plaintiff's second request for production,
20 the requested cancelled checks were not directly accessible to Defendants due to their misplacement
21 several years prior. *See* Roomy Decl. ¶ 5. The checks were eventually found by Harleen Chopra on
22 February 17, 2009. However, at that time, Mrs. Chopra only presented to Defendants copies of
23 those cancelled checks. Not until late April did Mrs. Chopra come forward with the originals of
24 those cancelled checks. Mrs. Chopra, at this time, has still not given a definitive answer as to why
25 the originals were not produced earlier. Had Defendants known of the existence of the originals
26 before, they would have produced them earlier.

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1 Furthermore, Defendants were not aware of any alteration of the checks until Plaintiff
2 brought that information forward. Again, when Mrs. Khan asked Mrs. Chopra about any alteration
3 with the cancelled checks, no specific information was given.

4 2) KHAN 308

5 Plaintiff alleges misconduct due to the fact that KHAN 308 was not produced until after the
6 copies of the cancelled checks, although they were presumably discovered at the same time, and
7 also because KHAN 308 was allegedly forged. However, although Mrs. Chopra eventually told
8 Mrs. Khan that the copies of the cancelled checks were found at the same time as KHAN 308, Mrs.
9 Khan was not aware of the existence of KHAN 308 at the time of the discovery of the checks. Only
10 later did Mrs. Chopra inform Mrs. Khan that she found KHAN 308 at the same time as the cancelled
11 checks. Upon asking Mrs. Chopra about the delay in producing KHAN 308, she did not directly
12 divulge that information. *See Roomy Decl. ¶ 15.*

13 As for the alleged forgery of KHAN 308, as stated above, Mrs. Chopra was the individual to
14 actually create the document and handle it from its inception. Any forgery which may have
15 occurred, therefore, was not done by Defendants, but rather by Mrs. Chopra. This may also explain
16 the delay in producing KHAN 308, as Mrs. Chopra likely took that time to engage in the alteration.
17 Thus, Defendants had no knowledge of any forgery of KHAN 308.

18 3) KHAN 309-314

19 Plaintiff alleges misconduct on the part of Defendants due to the fact that the "best" copies
20 of KHAN 309-314 were not produced until July 7, 2009, three months after they were requested.
21 However, as stated above, not until early July did Mrs. Chopra come forward with the "best" copies
22 of KHAN 309-314, when she presented them to Mrs. Khan. Mrs. Chopra has never explained the
23 delay in producing these documents. Not until early July were Defendants aware of the existence of
24 the "best" copies of KHAN 309-314. Mrs. Khan was also not aware of the existence of these "best"
25 copies during her declaration of June 9, 2009. Thus, the delay in producing these documents was
26 not a result of any willful concealment of Defendants.

27 4) Metadata of KHAN 308 and KHAN 125

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1 Roony Khan's most recent declaration submitted to Plaintiff described the recycling of her
2 computer which contained the metadata of KHAN 308 and KHAN 125. Subsequently, Plaintiff
3 determined her declaration to be insufficient due to the fact that she only discussed computers
4 bought starting in 2003, while KHAN 308 was created in 2002. Mrs. Khan, however, is currently
5 drafting a new declaration with her new attorney clarifying this discrepancy. Mrs. Khan wishes to
6 clarify that KHAN 308 and KHAN 125 were created in 2002 on a computer purchased in 2001,
7 which was later recycled in June of 2007.

8 Thus, the metadata of Khan 308 and Khan 125 was discarded with the computer well before
9 Plaintiff's labor dispute and before this lawsuit was filed. One factor courts weigh heavily is exactly
10 when the spoliation occurred. Ziegler, Richard F. and Seth A. Stuhl. "Spoliation issues arise in the
11 digital era." National Law Journal 20 (16 February 1998), B09. While not dispositive, respondents
12 are more likely to face tough sanctions if data was lost after the issuance of a protective order. In
13 Procter & Gamble Co. v. Haugen, the court, while imposing monetary sanctions for spoliation of
14 electronic evidence, refused to find bad faith on the respondent's part. It explained that, while the
15 duty to preserve evidence exists independently of a court order, the presence of an order would have
16 provided the basis necessary to judge respondent's conduct from a bad faith perspective. Procter &
17 Gamble Co. v. Haugen, 179 F.R.D. 622 (D.Utah, 1998). The fact that the metadata of KHAN 308
18 and KHAN 125 was at some point discarded is not influential enough to presume bad faith on the
19 part of Defendants, since the recycling was done prior to the filing of this lawsuit and Plaintiff's
20 dispute with the labor board. Had Defendants known they would need to produce the evidence in a
21 future lawsuit, they would have made sure to preserve said metadata.

22 E. Public Policy favors disposition of cases on their merits over the public interest in
expeditious resolution of litigation and the Court's need to manage its docket.

23 Courts have established that public policy favors deciding cases on their merits over default
24 judgments when the alleged misconduct does not threaten to interfere with the rightful decision of
25 the case. Busch, Inc. v. Natural Beverage Distrib., 69 F.3d 337, 348 (9th Cir. 1995). While
26 Defendants do not deny that the Court's need to manage its docket and the public interest in
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1 e expeditious resolution of litigation does prevail in some cases; this must only be adhered to when
2 proper litigation is no longer an option due to the misconduct. As stated above, even if the Court
3 determines that Plaintiff's allegations are true, such alleged misconduct can still be cured with lesser
4 sanctions. All evidence requested by Plaintiff has been produced either by original or by copy.
5 Thus, all evidence Plaintiff will need to litigate at trial she has at her disposal. Thus, because the
6 alleged misconduct of Defendants does not threaten to interfere with the rightful decision of the
7 case, public policy mandates that the Court allow this case to be decided on its merits.

8

9 **IV. CONCLUSION**

10 For the foregoing reasons, Defendants respectfully request the Court deny Plaintiff's
11 motion for default judgment and have this case be decided on its merits.

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13 Dated: August 5, 2009

Respectfully Submitted,

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